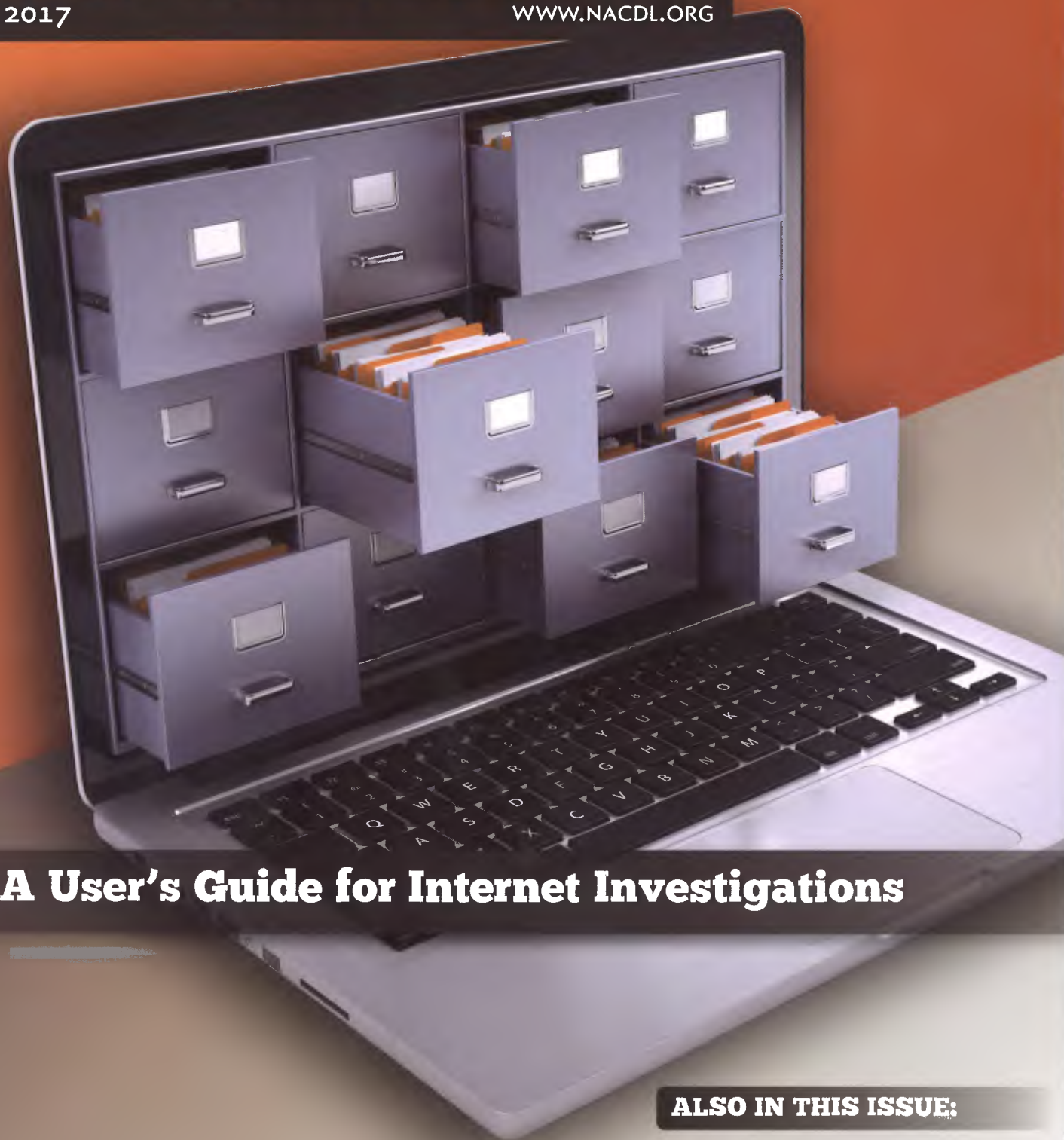


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## **A User's Guide for Internet Investigations**

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# SEARCH & SEIZURE COMMENTARY

BY MARC S. RASPANTI AND DOUGLAS E. ROBERTS

## Search Warrant Execution: Keeping the Wolves at Bay

One of the most stressful events that any entity can face is the unannounced execution of a search warrant by federal and/or state law enforcement agents. If the situation is not handled with cool-headed competence, it can wreak lasting havoc on any business, from a one-physician medical practice to a multi-national corporation.

The Fourth Amendment to the U.S. Constitution constrains the government's ability to obtain and execute search warrants. Of course, those "search and seizure" issues are not ripe for litigation until after agents have stormed the office and taken what they wanted.<sup>1</sup>

But in every instance, knowledgeable attorneys can minimize the impact of a search warrant by ensuring that a client (in the case of outside counsel) or a company (in the case of in-house counsel) is prepared for the disruption and agitation that the execution of a warrant invariably causes. Agents executing a warrant not only operate within the "four corners" of the warrant — gathering enumerated documents and items from identified locations — but they also use the time-honored element of surprise to interview unsuspecting, and often shell-shocked, employees. In this manner, agents gain access to information and witnesses that the warrant does not contemplate, but that may be essential to furthering their criminal investigation.

The time to prepare for the execution of a search warrant is not while it is happening. In-house counsel should have a plan in place if law enforcement shows up at the reception desk. Outside counsel should talk to clients about implementing such a plan. To guide counsel in the task of preparation, this article provides a succinct, albeit non-exhaustive, checklist of steps to be taken in the immediate aftermath of the government's unwelcome arrival.

## Corporate counsel should contact outside counsel immediately.

As soon as agents flash their badges, in-house counsel should be on the phone to the company's outside legal representatives. In-house counsel should ask the lead agent if the search can be delayed until counsel arrives on site, even though the answer is likely to be "no." Because agents are unlikely to wait, outside counsel should catch the next available plane, train, or automobile to get to the client's site post-haste. The presence of legal representation will add order and needed discipline to the chaos.

## Get the basics as quickly as possible.

Identify the lead agent and ask him or her to provide (1) the purpose of the search; (2) his or her name and the names of the other agents present; (3) the names of the agencies involved in the search; and (4) the name of the lead prosecutor to whom the agent reports. Record the information that has been requested. It is easy to forget even the most rudimentary details in the heat of the moment.

## Request the warrant and supporting affidavit(s).

While the agents need not provide a copy of the warrant at the outset of a search,<sup>2</sup> there is no harm in making the request. Note that the agents are required to leave a copy of the warrant, along with an inventory of property seized (discussed in greater detail below) when the search concludes. After receiving the warrant, counsel should review it to determine the terms and scope of the investigation. Additionally, counsel should ask the agent for any affidavits that were filed in court to support the issuance of the warrant. Agents are less likely to provide these affidavits than the actual warrant; indeed, the investigation may be under seal, which would render



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the affidavits unavailable at the time of the search. Still, counsel loses nothing by asking for the documents.

## Ensure the search is appropriately limited.

Do not consent to a search in areas or of materials beyond those listed in the warrant, at least until in-house and outside counsel are able to discuss the risks and benefits (if any) of permitting an expanded search. If the government wants information beyond the scope of the warrant, and counsel says no, it can always seek another warrant. Conversely, after agents have been given the information they want, it is impossible under most circumstances to claw it back.

## Instruct the employees.

If practical, send home all employees who are not essential to the investigation (i.e., those who will not monitor the search or gather information) or the functioning of the business, and close the office. If customers or patients are due to come in, they should be contacted and asked to reschedule their appointments. Direct all employees to preserve all files and documents and not to take any materials out of the office while the search is being conducted. Remind all employees that they are not

required to talk to the agents and that they have the right to consult with outside counsel before or during any interview.

### Choose a monitor or monitors.

Task one or more persons with monitoring the search. Outside counsel is ideally suited for this role. If outside counsel cannot be present, in-house counsel or trustworthy and knowledgeable employees should be given the responsibility. In any event, agents should not be left unattended. The monitor(s) should take detailed contemporaneous notes regarding the items seized, the areas searched, and the names of employees with whom the agents spoke (or attempted to speak). The monitor(s) should also ask to make copies of any materials necessary for ongoing operations before they are seized. Finally, the monitor(s) should ensure that the search is confined to the areas and materials designated in the warrant.

### Protect privileged, confidential, and proprietary materials.

Tell the agents that the company is not waiving any privileges that protect its documents and information. If the agents seize any documents that are potentially privileged or confidential or that contain

trade secrets or proprietary information, ask that such documents be segregated and kept under seal. Outside counsel should inform the lead prosecutor that protected materials have been seized and negotiate the procedures under which they will be reviewed.

### Remain organized.

Ensure a unified approach to the investigation, and, if necessary, work with a public relations firm to develop an appropriate response. Consider how to manage the press associated with a noisy or well-publicized search. If the government has demanded the subsequent production of documents or information, coordinate all responses through outside counsel and ensure that company representatives work with counsel to effectuate the company's approach.

### Determine what was seized.

Request an inventory of all items that agents seized (which the agent must prepare pursuant to Federal Rule of Criminal Procedure 41(f)(1)(B)), as well as copies of all photographs taken and all documents seized from the premises. If any seized materials are essential to business operations, outside counsel should attempt to negotiate a swift return from the lead prosecutor. Just as importantly, figure out what items of potential interest to the government were left behind. The monitor's notes regarding materials seized will be helpful in this regard.

### Debrief all employees who were present.

After agents complete the search, conduct interviews as soon as possible with all employees who were present for the execution of the warrant. The attorney-client privilege should protect these interviews from discovery because they are being conducted to assist counsel in providing legal advice to its client, the company.<sup>3</sup> This task is critical; it must be undertaken while memories are fresh. The information learned will give counsel insight into the purpose and direction of the government's investigation. Outside counsel should lead this debrief, and, where applicable, in-house attorneys should be involved. Document all discussions with employees, including, most pertinently, the statements, questions, and actions of agents that the employees observed during the search.

It is typically impossible to stop law enforcement from executing a warrant. But careful preparation for the agents' arrival and meaningful

involvement by competent criminal counsel during the execution can mitigate the damage that flows from the search and seizure. The time to prepare is now, while facing a search warrant is just an unpleasant hypothetical.

### Notes

1. See Fed. R. Crim. P. 41(g) (permitting a "person aggrieved by an unlawful search and seizure of property" to move for the property's return in the district where the property was seized).

2. *United States v. Grubbs*, 547 U.S. 90, 98-99 (2006).

3. E.g., *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); see also *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (communications by employees, in the form of questionnaire responses, to corporate counsel were privileged). ■

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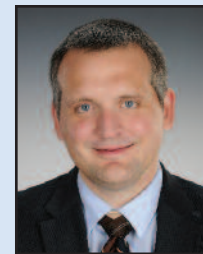


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